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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

KIMBERLY QUIROZ,

Plaintiff and Appellant,

v.

HAYDEN LENING, as Trustee, etc.,

Defendant and Respondent.

B289361

(Los Angeles County  
Super. Ct. No. BP156461)

APPEAL from an order of the Superior Court of  
Los Angeles County. Clifford Klein, Judge. Affirmed.

Schreiber & Schreiber, Inc., Edwin C. Schreiber, Eric A.  
Schreiber, and Ean M. Schreiber for Plaintiff and Appellant.

Venable LLP and Belinda Vega for Defendant and  
Respondent.

Kimberly Quiroz (appellant) appeals from an order denying her motion to set aside a judgment entered against her. Appellant is the former trustee of a trust created by her mother, Kathleen Quiroz, for the benefit of appellant and appellant's brother, Paul Anthony Quiroz (Paul), who has special needs. In October 2014, Paul filed a petition to compel accounting. After appellant was ordered to file an accounting, the court appointed Hayden Lening (respondent), the grandfather of appellant and Paul, as interim trustee. While acting as interim trustee, respondent found evidence suggesting appellant had misappropriated funds. On October 17, 2016, the court granted respondent's motion to surcharge appellant \$87,299.52 for mismanaging her brother's special needs trust. In January 2018, appellant filed her motion to set aside the judgment granting the surcharge. The trial court denied the motion, and this appeal followed.

We find no abuse of the trial court's discretion, therefore we affirm the order.

### **BACKGROUND**

Kathleen A. Quiroz (Kathleen) established a revocable living trust called the Kathleen A. Quiroz Trust, dated December 9, 2011 (the trust). Kathleen died on January 18, 2012, survived by her two children, appellant and Paul. On Kathleen's death, the trust became irrevocable. Pursuant to the trust, the trustee was required to divide the assets of the trust into two equal shares. One share was to be distributed to appellant, outright and free of trust, and the other was to be allocated to a special needs trust for the benefit of Paul. Appellant was the trustee of the trust and the special needs trust. Appellant and Paul were the sole beneficiaries the trust.

On October 2, 2014, Paul filed a petition to compel an accounting. Although Paul, through respondent, had informally requested accountings on several occasions, Paul did not receive anything amounting to a trust accounting. At the time of Paul's petition, appellant had never provided an accounting of the trust to him. According to Paul the information he had received indicated that the trust was not being administered in compliance with the terms of the trust. Paul demanded an accounting and sought removal of appellant as trustee.

On November 17, 2014, the court ordered appellant to file an accounting, which she failed to do. In its order dated April 20, 2015, the court removed appellant as trustee as a result of her failure to provide an accounting, and appointed respondent as interim trustee. The court granted respondent authority to engage an accountant and attorney to compel appellant to turn over relevant documentation. At the July 8, 2015 hearing, the court added a handwritten note to the probate notes: "Counsel is ordered to personally serve Kathleen Quiroz to be present at next hearing."<sup>1</sup>

Respondent then provided notice to appellant and her counsel by U.S. mail and email. The notice required appellant to appear and produce documents at an August 5, 2015 hearing. On July 28, 2015, appellant filed an objection to the notice to appear on the grounds that (1) she was not personally served, as required by the court's July 8, 2015 order; (2) she was not timely served 20 days before the hearing; and (3) the notice to appear did not tender witness fees.

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<sup>1</sup> We presume the court meant to refer to appellant, Kimberly Quiroz, as do the parties.

Though appellant did not appear at the August 5, 2015 hearing, her counsel appeared through court call.<sup>2</sup> Respondent appeared in pro. per., and Paul appeared with his attorney. The court notes from the August 5, 2015 hearing indicate that objections were filed on July 28, 2015, and describe those objections as follows:

“FACTS: objector was not personally served as required by court’s order of 7/8/15; notice to [appear] and produce docs was not timely served--ntc/copy OK.”

Despite his efforts, respondent could not thereafter locate or serve appellant. Respondent hired First Legal Investigations, a licensed detective agency, to locate appellant. Investigator Debbie Le Schow provided a detailed declaration to the court describing her unsuccessful efforts to locate appellant.

On September 10, 2015, respondent filed an ex parte application asking the court to hold appellant in contempt. Respondent attached documentation showing his diligent, though unsuccessful, attempts to personally serve appellant.

On December 8, 2016, the court filed an order granting respondent’s petitions, finding that “all notices of hearing have been given as required by law.” Respondent was appointed permanent trustee of the trust, and a judgment was entered surcharging appellant in her personal capacity in the amount of

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<sup>2</sup> Appellant disputes the assertion that she was represented by counsel at the August 5, 2015 hearing, citing the court notes from that hearing, stating that appellant was not present. However, the court notes are unclear and the trial court found respondent’s declaration which stated that appellant’s counsel was present by court call, credible.

\$87,299.52, representing the amount of assets that went unaccounted for during appellant's tenure as trustee.

On January 4, 2018, appellant filed a motion to set aside the judgment. Appellant argued that the judgment was void due to respondent's failure to personally serve her with notice to appear. Appellant argued that the court had the power to vacate the purportedly fraudulent judgment based on Code of Civil Procedure section 473, subdivision (d).<sup>3</sup>

On February 7, 2018, the court filed a written order denying appellant's motion. The court found that appellant had failed to establish that the judgment was obtained by fraud. Instead, appellant "consistently failed to appear in court," and could not establish "any misrepresentation was made to the Court regarding service." Given that appellant was "deliberately concealing her location," the court was permitted to dispense with its own order for personal service. Further, appellant did not contend that she would have presented a meritorious defense to the petition, as required. Finally, the court held that appellant's motion was untimely, and that she presented no explanation for her delay.

On April 4, 2018, appellant filed her notice of appeal.

### **DISCUSSION**

Appellant argues that because she was not properly served, and did not appear at the hearings, the matter proceeded as a default, and should be treated as a default judgment. She further argues that a motion for relief from a default judgment can be made at any time. She contends that respondent's failure to

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<sup>3</sup> All further statutory references are to the Code of Civil Procedure.

personally serve her led to the judgment against her, and that her motion was made within a reasonable time.

### **I. Applicable law and standard of review**

Generally, an application for relief from judgment under section 473 must be “made within a reasonable time, in no case exceeding six months, after the judgment.” (§ 473, subd. (b).)

If a party that has not been served with a summons is subject to a default judgment, and can make a showing that the party lacked actual notice “not caused by his or her avoidance of service or inexcusable neglect,” the party may file a motion to set aside the default judgment. (§ 473.5; *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180 (*Trackman*).) The motion must be served and filed within a reasonable time, in no event exceeding the earlier of: “(i) two years after entry of a default judgment . . . or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.” (§ 473.5, subd. (a).)

To set aside a default judgment based on extrinsic fraud, the moving party must satisfy three elements. “First, the defaulted party must demonstrate that it has a meritorious case. Second[], the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action. Last[], the moving party must demonstrate diligence in seeking to set aside the default once . . . discovered.’ [Citation.]” (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982.) After the six-month period set forth in section 473 has passed, such relief is equitable, rather than statutory, and is also reviewed for abuse of discretion. (*Rappleyea*, at pp. 981-982.)

A motion to set aside a judgment pursuant to section 473 is reviewed for abuse of discretion. (*Rappleyea, supra*, 8 Cal.4th at p. 981.)

## **II. The judgment was not a default judgment**

Appellant argues that the judgment here is, in essence, a default judgment. In order to avoid the six-month time limit set forth in section 473, subdivision (b), appellant argues that a “motion on the ground that the entry of default and [a] default judgment were void can be made at any time.” (*Batte v. Bandy* (1958) 165 Cal.App.2d 527, 537-538 (*Batte*).)

Section 585 governs the procedure for obtaining a default judgment. Such a judgment is appropriate where a defendant has been served and no answer, demurrer, or responsive motion has been filed. (§ 585, subd. (a).) Here, appellant filed responsive documents and appeared in the action. She provides no authority for her position that the judgment should be treated as a default under the circumstances of this case.

The cases cited by appellant suggesting default judgments may be void for lack of proper service are cases in which the initial service of summons was contested, and are thus distinguishable. (See *Batte, supra*, 165 Cal.App.2d 527 [affirming order vacating default judgment where substituted service of summons was unauthorized]; *Trackman, supra*, 187 Cal.App.4th 175 [reversing order vacating default judgment where defendant argued he was not served with summons and complaint because proof of service was not facially void].) *Olvera v. Olvera* (1991) 232 Cal.App.3d 32, is also distinguishable. In that loan case, the plaintiffs filed an action for breach of oral contract and fraud on the same date that they filed a lis pendens affecting the defendants’ property. (*Id.* at p. 35.) Service of the summons and

complaint was by publication. While one of the defendants had acknowledged receiving a letter regarding the lien on the house, service of summons had not resulted in actual notice of the court action to the defendant. The trial court did not abuse its discretion in granting the defendant relief from default, as she was under no obligation to respond and was justified in her belief that she could reasonably await further action by the plaintiffs before affirmatively making inquiries as to the nature and progress of the litigation. (*Id.* at p. 41.) Such is not the case here. Appellant was aware of the proceedings, was represented by counsel, and had actual notice of the hearing at issue.

Appellant provides no authority suggesting that a judgment may be treated as a default judgment where, as here, the alleged absence of proper service for one hearing resulted from the absent party's purposeful attempts to avoid service. Further, this single purported absence of proper service did not result in prejudice to appellant, as the record suggests her attorney appeared at the hearing in question.<sup>4</sup>

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<sup>4</sup> Appellant provides a footnote stating: "Since [appellant] was never served, she did not appear nor was she represented at any of the hearings, so the matter proceeded as a default." This statement provides no citation to the record to support it, and appears patently false. Appellant's attorney appeared on her behalf at the March 4, 2015 hearing on the petition to compel accounting. Further, she filed a "First Report and Account of Kimbry [*sic*] Quiroz as Trustee of the Kathleen A. Quiroz Trust dated December 9, 2011," on March 4, 2015, in response to the court's order granting Paul's petition to compel accounting. Communications in the record to and from appellant's attorney also show that appellant was aware of the proceedings. As to the hearing at which appellant was purportedly required to be



The trial court properly found that the judgment in this matter was not obtained by default. Appellant appeared and participated in the proceedings throughout. Thus, the six-month time limit set forth in section 473, subdivision (b), applied, and appellant's motion, which was filed over a year after judgment was entered, was untimely.

### **III. The judgment was not obtained by fraud**

Appellant further argues that the judgment was obtained by fraud. Appellant cites *McGuinness v. Superior Court* (1925) 196 Cal. 222, 232, for the proposition that "the power to vacate upon motion a judgment obtained by fraud is inherent in courts of general jurisdiction, and . . . the same may be exercised after the lapse of the statutory time . . . provided that such motions are made within a reasonable time. What is a reasonable time is a matter of sound legal discretion in the court in which the motion is made." Appellant contends that her motion, made just over a year after entry of judgment, was made within a reasonable time.

The record supports the trial court's determination that the judgment was not obtained by fraud. The trial court found that appellant failed to establish any misrepresentation that was made to the court regarding service. This finding is amply supported by the record, which details respondent's efforts to locate appellant in order to personally serve her. Respondent's efforts, in combination with the evidence showing appellant's knowledge of the proceedings, support the trial court's determination that appellant had "not provided a proper address for service," and was "deliberately concealing her location." After

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personally served, appellant was aware of the hearing. Her attorney filed objections to the form of service, and the record suggests he appeared by court call at the August 5, 2015 hearing.

engaging in such deliberate concealment in spite of respondent's efforts to locate her, appellant cannot now claim to have been the victim of fraud.<sup>5</sup> Nor is she entitled to seek relief from the judgment after the statutory time frame.

**IV. The trial court did not abuse its discretion in denying the motion for relief**

The trial court did not abuse its discretion in denying appellant's motion to set aside the judgment. The record supports the trial court's determinations that it was not a default judgment, as appellant appeared and participated in the proceeding through her attorney. The record further supports the trial court's determination that the judgment was not obtained by fraud, nor did appellant have a meritorious defense to the action. Finally, the trial court acted within its discretion in determining that appellant's motion was not made within a reasonable time, as she was represented by counsel throughout the proceedings and was aware of the judgment well before making the motion.

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<sup>5</sup> Further, in order to set aside a default judgment on the grounds of extrinsic fraud, appellant was required to show that she had a meritorious defense to the action. (*Rappleyea, supra*, 8 Cal.4th at p. 982.) Although the trial court noted that appellant did not contend that she had a meritorious defense to the petition if she had been personally served for the hearing at issue, appellant has failed to address this element on appeal. Thus, appellant's attempt to obtain relief from judgment on the ground of fraud was properly denied for the second, independent reason that she did not show a meritorious defense.

**DISPOSITION**

The order is affirmed. Respondent is awarded his costs of appeal.

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\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, P. J.  
LUI

\_\_\_\_\_, J.  
HOFFSTADT